* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ARB. PETITION No.66/1999

Date of hearing: 14.03.2007
% Date of decision: 20.03.2007

HALDIRAM MANUFACTURING CO. LTD. ... PETITIONER
Through: Mr.Sandeep Sethi, Sr. Advocate with
Mr.Mahinder Rana, Advocate

VERSUS

M/S SRF INTERNATIONAL ...RESPONDENT
Through: Mr. Sanjeev Puri and Mr.Rohit Puri,
Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

SANJAY KISHAN KAUL, J.

1. The petitioner filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) against the present respondent as respondent no.1 and M/s Prime International, a partnership firm, as respondent no.2. The petition states that the petitioner is manufacturer/ exporter of high quality of Indian sweets, salty and spicy mixture and pure Asian vegetarian food snacks commanding good reputation. The petitioner is a unit of the Haldiram Group of Companies enaged in the business of financing and exports. The original second respondent is stated to be the sole distributor

appointed for distribution of goods manufactured by the petitioner in Saudi Arabia.

2. The petition states that an agreement dated 19.6.1997 was entered into between the petitioner, the respondent and the original respondent no.2 for exclusive marketing and distribution of 'Haldiram' brand of snacks and food in Saudi Arabia. The said agreement contains an arbitration clause 20 providing for arbitration as a mode of settlement of disputes. Clause 20 is as under:

> "ARBITRATION: As applicable for international business."

3. The respondent herein is stated to have placed two purchase orders, both dated 14.1.1998, for supply of Haldiram brand of sweets and namkeens on the petitioner and M/s Haldiram Marketing Limited. The goods were to be despatched latest by 5.2.1998 and the payment had to be made by the respondent to the manufacturer within four weeks of handing over of the consignment in Delhi. The goods are stated to be consigned vide invoice dated 9.2.1998 for Rs.2,89,761.46 and invoice dated 7.2.1998 for Rs.1,88,815/-. The first invoice is in the name of the petitioner while the second is in the name of M/s Haldiram Marketing Limited.

4. In terms of the agreement dated 19.6.1997, it was specified that the products had to be supplied by the manufacturer to the exporter on local sale basis for onward despatch in Saudi Arabia, which has to be paid thereafter. Use of 'Khas Khas' (poppy

seeds) as an ingredient is stated to be strictly forbidden in any preparation in Saudi Arabia and is treated as a narcotic drug. Thus, an specific assurance was taken from the manufacturer that there would be no use of 'Khas Khas'. However, the manufacturers are stated to have received a letter from the exporter stating that the Saudi Arabian buyer is not agreeable to take delivery of the consignment in February, 1998 as per the purchase order as in three cases of 100 gram pouches of 'Cornflakes mixture' Khas Khas was printed as one of the ingredients. This is stated to be so with the consignment of September, 1997 while there was no such problem in respect of the consignment sent in February, 1998. Be that as it may, the manufacturer advised for diversion of the containers to its nominated distributor M/s Giant Super Market, Sharjah for removal of any such alleged pouches and send the balance containers back to Saudi Arabia.

5. The payments received towards the material cost against invoices dated 9.2.1998 and 7.2.1998 were returned to the exporter vide letter dated 14.4.1998 to facilitate the transaction. However, after certain communications, the distributors expressed their inability to take delivery of the consignment. Goods were stated to be lying during this period of time at the sea port in the shipping container for over three months and this is stated to be contrary to the agreed terms.

6. In view thereof, disputes are stated to have arisen between the

parties as to whether there is any breach of contract and the entitlement of damages, if any, for the petitioner.

7. A reply was filed by the respondent herein contesting this application. One of the objections taken was that M/s SRF International does not have any entity in law and it is only a division of M/s SRF Limited. It may be noticed that the description of the respondent is "M/s SRF International (a division of M/s SRF Limited)". The second objection was about the maintainability of the petition since the provisions of Section 8 of the said Act would apply only in respect of the matter pending before the Court. It is further stated that the agreement dated 19.6.1997 contained an arbitration clause in terms of which arbitration was to be conducted as applicable for international business. This procedure agreed to between the parties to conduct the resolution of disputes was stated not to have been followed. The disputes were also stated to be beyond the terms of the agreement dated 19.6.1997. The reply also pointed out that the purchase orders also contained an arbitration clause. This clause is in the following terms:

> "Arbitration
> In case of any dispute between the parties to this order, the same will be referred for arbitration to a person, who will be mutually nominated by the parties hereto and whose decision shall be final and binding."

8. On merits, the respondent sought to put the blame on the petitioner for not complying with the terms of the agreement.

The respondent also claims to have sufferred losses on account of the conduct of the petitioner and sought dismissal of the petition. A similar reply was also filed by original respondent no.2.

9. The petitioner thereafter moved an application seeking amendment of the petition whereby the nomenclature of the petition was sought to be changed from one under Section 8 of the said Act to one under Sections 8 and 11 of the said Act. This application was allowed on 26.2.2004. A second application for amendment was also filed in terms whereof reference was made to the arbitration clause contained in the purchase order and it was stated that the arbitration clause in question sought to be relied upon was as contained in the purchase order dated 14.1.1998 and not the one under the agreement dated 19.6.1997. Broadly speaking, the petition was sought to be converted into one under Section 11 of the said Act for reference of disputes in terms of the aforesaid clause contained in the agreement dated 14.1.1998 from one under the agreement dated 19.6.1997. This application was also allowed by the order dated 5.9.2006.

10. On 18.1.2007 respondent no.2 pointed out that in view of the aforesaid amendment, the said respondent ceases to be a necessary party as it was not a party to the agreement dated 14.1.1998. In view thereof, an order was passed on the said date for the deletion of original respondent no.2 from the array of parties. The present respondent filed a reply to the amended petition, inter alia, claiming that there must be a dispute in

existence between the parties prior to the Court exercising jurisdiction for reference of disputes. Thus, the dispute ought to have been raised and reference sought to arbitration. It is contended that without resorting to such a procedure straightway, the petition has been filed under Section 11 of the said Act. It may, however, be noted that indisputably a letter dated 16.9.1998 was addressed by the petitioner to the respondent setting out the history of the dispute and calling upon the respondent to make the payment of the contracted goods. There is, however, no reference to any intent of the petitioner for resolution of disputes by arbitration in such letter.

11. It will be appropriate at this stage to refer to the letter dated 14.1.1998 itself since that now forms the basis of the claim of the petitioner for reference of disputes to arbitration. The letter is addressed by the respondent to the petitioner about the subject matter of goods and contained the aforesaid arbitration clause. A similar letter of the even date with the same clause is addressed to M/s Haldiram Marketing Limited.

12. The basic defence of the respondent is that if the said clause of arbitration applies, the petition under Section 11 of the said Act could be filed only after there is invocation of arbitration and failure of the respondent to agree to the appointment of an arbitrator in terms of the arbitration clause. In the present case the arbitration envisaged is of a sole arbitrator. It is only on the failure of the other party to agree to the appointment of an

arbitrator that a cause arises for the Court to exercise jurisdiction under Section 11(5) of the said Act.

13. The respondent has also raised a plea of bar of time since the amendment sought for whereby the reference was claimed under the contract dated 13.4.1998 was only by amendment and the amendment application was filed in 2004. Thus, the period of three years had lapsed from the date of the contract or the last cause of action pleaded which was 16.9.1998. The other defences are more or less similar as raised in the earlier reply.

14. Learned counsel for the parties were heard at length. It can really not be doubted that the provisions of Section 8 of the said Act would really have no application to the present case since the same pertains to an application being filed in an action brought before a judicial authority. Thus, it is only where some proceedings are pending, the opposite party, not later than submitting his first statement on the substance of dispute, can move an application for reference of disputes to arbitration. The present case being one where the appointment of an arbitrator is sought through the process of Court without there being any other judicial proceedings is, thus, to be covered by the provisions of Section 11 of the said Act. The relevant provisions of the said Section read as under:-

> "11.**Appointment of arbitrators**.-
>
> (1) .....
>
> (2) Subject to sub-section (6), the parties are free

to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and-

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take

> the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

15. In terms of sub-section (6) of Section 11 of the said Act, there has to be a failure of a party or the parties to act in accordance with the procedure agreed to between the parties for arbitration for an application to be made for appointment of an arbitrator. Sub-section (3) of the said Act comes into force only where there is failure of an agreement referred to in sub-section (2) of the said Act. Sub-section (5) provides that in an arbitration with a sole arbitrator if the parties fail to agree on the arbitrator within 30 days from the receipt of a request of one party or the other party, an application can be filed. Thus, on a plain reading of the provisions, there has to be a failure to agree to an arbitrator in case of a sole arbitration before a request/application can be made.

16. The controversy in the present case has arisen on account of the fact that indisputably the petitioner never called upon the respondent to appoint an arbitrator and, thus, the question of failure to so appoint did not arise.

17. Learned senior counsel for the petitioner contended that the petition filed before this Court itself can be treated as an application seeking appointment of an arbitrator. In this behalf learned senior counsel referred to the judgment of the learned single Judge of this Court in the case of *Messers. Greenland Foods Pvt. Ltd., v. Union of India, AIR 1973 Delhi 157*. In respect of the

provisions of Section 20 of the Indian Arbitration Act, 1940 it was held that the application so filed itself can be treated as an application for appointment of an arbitrator, if there has been no previous notice. Similarly, in *Anand Kumar Jain v. Union of India, 1984 RLR 438* it was held that even if there was no formal demand made, the filing of the application under Section 20 of the 1940 Act amounts to the demand.

18. A reference has also been made to the judgment of the learned single Judge of this Court in *G. Premjee Trading Pvt. Ltd. v. Ashoka Alloys Limited, 1998 (47) DRJ 262*. The matter pertained to the said Act and one of the defences was that the petitioner had failed to identify the disputes arisen between the parties. It was found that the area of disputes and differences had been clearly stated in the petition filed by the petitioner and the same were required to be adjudicated upon through the process of arbitration. The arbitration clause did not indicate as to who would be the arbitrator to adjudicate upon the disputes arriving between the parties. Since no procedure was described for appointing an arbitrator, sub-section (5) of Section 11 of the said Act would come into play and if the party fails to agree upon and appoint an arbitrator, the Court would have the power to make such an appointment.

19. Learned senior counsel for the petitioner referred to some judgments which in the first blush appear to take a view that the procedure prescribed under Section 11 of the said Act must be

followed prior to approaching the Court. Learned counsel pointed out that these judgments were based on the given arbitration clause and would not apply in the present case. Since these are also the judgments relied upon by learned counsel for the respondent, it would be appropriate to discuss the same at this stage.

20. In *Alstom v. North Eastern Electric Power Corp., 2006 (87) DRJ 47* the arbitration clause specifically provided that "either party may require, by written notice to the other party, that the matters in dispute be referred to arbitration as hereinafter provided." In *Munish Gupta & Ors. V. Ram Dass & Ors., 2002 (Suppl.) Arb. LR 122 (Delhi)* the arbitration clause provided for arbitration with a sole arbitrator "if the parties fail to agree on the arbitrator within 30 days from the receipt of a request by one party from the other party to so agree". Similarly, a Division Bench of this Court in *Talwar Brothers Pvt. Ltd. and others V. Punjab State Industrial Development Corporation Ltd., 2001 (3) Arb. LR 587 (Delhi) (DB)* was dealing with a provision for the arbitrator appointed by one party acting as a sole arbitrator in case of failure of the other party to appoint their arbitrator. It was, thus, held that once this procedure was prescribed, the sole arbitrator was well within his right to proceed with the arbitration and there was no mandatory requirement of approaching the Chief Justice for appointment of an arbitrator.

21.In *Wipra Finance Ltd. V. SRG Infotech (India) Ltd. and Anr., 2005*

(3) Arb. LR 502 (Delhi) the arbitration clause provided for reference to the arbitration by two arbitrators, one to be appointed by each party to the dispute in accordance with the provisions of the 1940 Act. It was held that it was incumbent upon the petitioner to serve a notice upon the respondent and appoint its own arbitrator and call upon the respondent to nominate its arbitrator. The cause for approaching the Court would arise only on failure of the second party to nominate its arbitrator. Thus, Section 11 of the said Act was held to require one party to put the other party to notice and call upon the other party to act as per procedure agreed to between the parties for appointment of an arbitrator and the Chief Justice would be approached only if the party noticed failed to act as per procedure.

22. A reference has also been made to the judgment of the Apex Court in *Datar Switchgears Ltd. V. Tata Finance Ltd. and another, 2000(3) Arb. LR 447 (SC).* The arbitration clause in question provided for reference of disputes to an arbitrator to be nominated by the lessor. Since the lessor was never called upon to appoint an arbitrator, there was, thus, no failure to so appoint, the procedure under Section 11 of the Act was held not to have been followed. The forfeiture of the right of one party to appoint an arbitrtor would, thus, arise only when if called upon to do so and on failing to do so within the stipulated time.

23. Learned counsel for the respondent also referred to the judgment

in *Varun Associates V. Army Welfare Housing Organisation, 122 (2005) DLT 475*. Here again was a case where the opposite party was to appoint an arbitrator who was so appointed within 30 days from the date of the receipt of the notice. This was held to be a proper appointment even though an application under Section 11 (6) of the said Act had been filed.

24. The other aspect emphasised by learned counsel for the respondent was in respect of the petition being barred by limitation. It was pleaded that the original application was for reference of disputes under a different contract while after amendment reference has been made to a different contract. Learned counsel referred to a Division Bench judgment in *P.B. Enterprises, Engineers and Contractors, Burdwan V. Eastern Coalfields Limited, Burdwan and Ors., 2004 (2) Arb. LR 171 (Jharkhand) (DB).* The limitation for filing an application under Section 11(6) of the said Act was held to be counted from the date on which 30 days expired from the date of the notice and if the petition is filed more than three and a half years later, the same was held to be barred by time. In this behalf, learned counsel for the respondent has also referred to the provisions of Section 21 of the said Act, which reads as under:

> "21.**Commencement of arbitral proceedings**.- Unless otherwise agreed by the parties, the arbitral proceedings, in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

25. Learned counsel submitted that the arbitral proceedings in view

of the aforesaid provision could commence only when a request for reference of disputes to arbitration was made and since they were never so made, the amended application cannot cover the plea of bar of time. The respondent also referred to the provisions of Section 43 of the said Act to advance the proposition that it is the provisions of the Limitation Act, 1963 which would apply and such limitation would commence from the date referred to in Section 21 of the said Act which provides for the commencement of arbitral proceedings from the date when such request was made. Thus, such a request can be treated as to be within limitation only if the present petition is deemed to be a request for arbitration.

26. On a conspectus of the aforesaid judgments on the question of requirement of a prior notice to invoke the jurisdiction under Section 11 of the said Act, there is no manner of doubt that the procedure prescribed under the said Section has to be followed. Sub-section (5) of Section 11 of the said Act provides for the procedure as per the arbitration clause. Thus, wherever the arbitration clause prescribes the mode and manner of invocation of arbitration, it is that procedure alone which must be followed and till such a procedure is followed, there can be no question of invocation of the jurisdiction of the Chief Justice of the High Court under Section 11 of the said Act. The moot point is whether there is any such procedure envisaged under the present arbitration agreement. The various judgments referred to clearly had

arbitration clauses where either one party had to call upon the other party or had to nominate its own arbitrator or a designated authority had to appoint an arbitrator. The arbitration clause in the present case only states that the reference has to be to a sole arbitrator. The sole arbitrator has to be mutually nominated by the parties. There was no such mutual nomination. There is no specific procedure prescribed under the arbitration clause. In the absence of any procedure, it cannot be said that there is violation of the pre-requisite before Section 11 of the said Act can be invoked.

27. There is no doubt that if the petitioner had at least called upon the respondent to appoint an arbitrtaor, this difficulty would not have arisen but the line of judgments starting from M/s Greenland Foods Pvt. Ltd. (supra), Anand Kumar Jain (supra) and finally in G. Premjee Trading Pvt. Limited (supra) held that once the arbitration clause does not indicate as to who would be the arbitrator and no specific procedure is prescribed, the Court should have the power to appoint an arbitrator. In view thereof, it cannot be said that this Court is devoid in the facts of the present case to appoint an arbitrator.

28. Now coming to the question of bar of limitation, it is no doubt true that earlier the reference was made to the agreement dated 19.6.1997. However, along with the original documents, the purchase orders had also been filed. The original agreement was a wider agreement. Once the dispute arose within a specific

purchase order which may flow from the original agreement, a specific clause of arbitration is contained in the particular purchase order, then the arbitration clause of that purchase order would apply. Thus, the appointment of the arbitrator has to be made in terms of the arbitration clause contained in the purchase order dated 14.1.1998. The petitioner has amended the original petition and it is not as if the petition has been filed after the expiry of three years from the dispute. The amendment was sought on the basis that reference to the agreement should be of 14.1.1998 and not the original agreement dated 19.6.1997. It, thus, cannot be said that merely because the amendment had been made subsequently by correcting the aforesaid aspect, the claim for arbitration is beyond the period of three years.

29. Insofar as the defence of the description of the respondent is concerned, the respondent itself defines itself as M/s SRF International, a Division of M/s SRF Limited and that is how this suit is titled and there is no infirmity in the same.

30. Disputes undoubtedly exist between the parties. The respondent claims that it is not liable to pay the amount as demanded by the petitioner, but on the other hand is entitled to damages from the petitioner. Thus, there is existence of disputes which are liable to be referred to arbitration.

31. I am, thus, of the considered view that the disputes between the parties are liable to be referred to arbitration of an arbitrator to be appointed by this Court. I deem it appropriate to appoint

Mr.Justice S.K. Aggarwal (Retd.), A-62, Nizamuddin East; Mob. No.9818000270, as the sole arbitrator to decide the disputes between the parties. The arbitrator will fix his own sitting fee, subject to a maximum fee of Rs.1,00,000/- for the total arbitration to be shared equally between the parties. Parties are left to bear their own costs.

32.A copy of the judgment be forwarded to the Arbitrator.

March 20, 2007 SANJAY KISHAN KAUL, J.
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